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Supreme Court, U.S.
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No. 95-1222

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CLARENCE N. S. SHAK, *Petitioner,*

vs.

KEITH TANAKA, individually and as a police officer in the City and County of Honolulu, State of Hawaii, MICHAEL NAKAMURA, individually and as the Chief of Police of the City and County of Honolulu, State of Hawaii, KATHERINE DASHIELL, individually and as a Judge in the District Court of the First Circuit, State of Hawaii, SABRINA MCKENNA, individually and as a Judge in the District Court of the First Circuit, State of Hawaii, KEITH KANESHIRO, ESQ., individually and as the Prosecuting Attorney for the City and County of Honolulu, State of Hawaii, and STATE OF HAWAII, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS KEITH TANAKA, MICHAEL NAKAMURA, AND KEITH KANESHIRO'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Respondents Keith Tanaka and Michael Nakamura violated Clarence N. S. Shak's constitutional right to due process under the Fourth and Fourteenth Amendments of the United States Constitution by arresting and briefly detaining him without a judicial determination of probable cause?

2. Whether Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro violated Clarence N. S. Shak's constitutional right to due process under the Fourth and Fourteenth Amendments of the United States Constitution by arresting, detaining, and arraigning him without filing and providing Mr. Shak with a formal written complaint prior to a court hearing?

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Is No Inconsistency With This Court's Decisions in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). 6

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JURISDICTIONAL STATEMENT

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. Section 1254 (1). Jurisdiction in the Ninth Circuit Court of Appeals was conferred by 28 U.S.C. Section 1291 on a final judgment entered on August 12, 1994.

CONCISE STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In the District Court, Petitioner Clarence N.S. Shak ("Mr. Shak") alleged violations of his constitutional right to due process under 42 U.S.C. § 1983 against Respondents Keith Tanaka ("Officer Tanaka"), individually and as a police officer of the City and County of Honolulu, State of Hawaii, Michael Nakamura ("Chief Nakamura"), individually and as Chief of Police of the City and County of Honolulu, State of Hawaii, Keith Kaneshiro ("Prosecutor Kaneshiro"), individually and as the Prosecuting Attorney for the City and County of Honolulu, State of Hawaii, Kathleen Dashiell ("Judge Dashiell"), individually and as a Judge of the District Court of the First Circuit, State of Hawaii, Sabrina McKenna ("Judge McKenna"), individually and as a Judge of the District Court of the First Circuit, State of Hawaii, and the State of Hawaii. Excerpts of Record ("E.R.") 1-11.

The uncontroverted facts[1] show that on December 23, 1993, at approximately 4:20 p.m., Officer Tanaka was on duty in his patrol car in the vicinity of Piikoi Street and Lunalilo Street. Clerk's Record 15 ("C.R. 15").[2] Officer Tanaka observed Mr. Shak standing within the traveled lanes of Piikoi Street (C.R. 15), while Mr. Shak distributed written material to motorists. Transcript of Proceedings ("Tr.") 7/27/94 at 20. Officer Tanaka approached Mr. Shak and told Mr. Shak to stop entering the roadway because he was causing a safety hazard to himself and traffic. C.R. 15. Officer Tanaka then left Mr. Shak on the sidewalk and responded to another call. C.R. 15.

At approximately 4:45 p.m. on the same day, Officer Tanaka returned to the area of Piikoi Street and Lunalilo, where he again observed Mr. Shak standing in the roadway of Piikoi Street. C.R. 15. Again, Officer Tanaka asked Mr. Shak to step over to the sidewalk, and after a few moments of conversation, Officer Tanaka arrested Mr. Shak for violating

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[1] On page 1 of his Memorandum in Opposition to Defendants Keith Tanaka, Keith Kaneshiro and Michael Nakamura's Motion to Dismiss or in the Alternative Motion for Summary Judgment (see Clerk's Record 17), Mr. Shak conceded that he did not dispute any of the facts contained in Defendants Keith Tanaka, Keith Kaneshiro and Michael Nakamura's Supplemental Memorandum in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment (*see* Clerk's Record 15).

[2] All citations to "C.R. 15" refer specifically to the factual background on page 2 of Defendants Keith Tanaka, Keith Kaneshiro and Michael Nakamura's Supplemental Memorandum in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment, which is contained in Clerk's Record 15.

Hawaii Revised Statutes (hereinafter "HRS") § 291C-76 (Pedestrian on roadways),[3] § 291C-77 (Pedestrians soliciting rides, business or attention of motorist),[4] and § 291C-172 (Refusal to provide identification).[5] C.R. 15; E.R. at 3.

Mr. Shak was then transported to the Honolulu Police Station, where he was detained for approximately one hour. Tr. 7/27/94 at 7. While detained, Mr. Shak was finger-printed and booked, then released on $60.00 bail at approximately 6:30 p.m. E.R. at 4. Upon his release, Mr. Shak was given a bail receipt informing him of the three charges and the time to appear in court. Tr. 7/27/94 at 5-6; Mr. Shak's Brief at 4.

On December 29, 1993, Mr. Shak appeared for arraignment before Judge Dashiell in the District Court of the First Circuit, Honolulu Division. E.R. at 4. At Mr. Shak's December 29, 1993 arraignment, the Deputy Prosecuting Attorney orally read the charges

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[3]"§ 291C-76 Pedestrian on roadways. (a) Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway, bicycle lane, or bicycle path..." Haw. Rev. Stat. § 291C-76(a) (1993).

[4]"§ 291C-77 Pedestrians soliciting rides, business or attention of motorist. (a) Except as otherwise provided by county ordinance, no person shall stand in, walk along, or otherwise occupy a portion of a highway for the purpose of soliciting a ride, employment, business, or contributions from the occupant of any vehicle..." Haw. Rev. Stat. § 291C-77(a) (1993).

[5]"§ 291C-172 Refusal to provide identification. Any person detained for a violation of this chapter shall provide the person's name and address, or any proof thereof, or both, upon the lawful order or direction of any police officer in the course and scope of the officer's duties pursuant to this chapter." Haw. Rev. Stat. § 291C-172 (1993).

to Mr. Shak. E.R. at 5. Mr. Shak refused to enter any plea, so Judge Dashiell entered a plea of "not guilty" on behalf of Mr. Shak and set the date of March 17, 1994, as the date for Mr. Shak's trial. E.R. at 5.

On March 17, 1994, Mr. Shak appeared before Judge McKenna for trial. E.R. at 5. Again, a Deputy Prosecuting Attorney orally read the charges and a description of the offenses to Mr. Shak. E.R. at 6; Tr. 7/27/94 at 12. Mr. Shak refused to enter a plea, so Judge McKenna entered a plea of "not guilty" on behalf of Mr. Shak. E.R. at 6; Tr. 7/27/94 at 11. Mr. Shak made a motion to dismiss charges against him, alleging that the court lacked jurisdiction, which Judge McKenna denied. E.R. at 5. As the trial proceeded, Officer Tanaka testified as to what he had seen Mr. Shak doing on December 23, 1993, which led him to believe that Mr. Shak was violating the law. E.R. at 6. Based on the evidence before the court, Judge McKenna found Mr. Shak guilty of all three of the offenses, and Judge McKenna fined Mr. Shak approximately $35.00.[6] E.R. at 6; Tr. 7/27/94 at 14. Mr. Shak did not appeal his conviction. Tr. 7/27/94 at 16.

B. PROCEDURAL BACKGROUND

On April 14, 1994, Mr. Shak filed his complaint against Officer Tanaka, Chief Nakamura, Prosecutor Kaneshiro, Judge Dashiell, Judge McKenna and the State of Hawaii in United States District Court for the District of Hawaii, alleging violation of his constitu-

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[6]It is evident from Mr. Shak's Opening Brief that he does not contest this factual background. See Mr. Shak's Opening Brief at 4-7.

tional rights under the Fourth and Fourteenth Amendments. E.R. at 1-11. Officer Tanaka, Chief Nakamura and Prosecutor Kaneshiro moved for dismissal of all claims, and in the alternative, for summary judgment. C.R. 15. Judge Dashiell, Judge McKenna and the State of Hawaii joined in that motion. C.R. 16. On August 9, 1994, Judge Samuel P. King granted the Defendants' dispositive motion. E.R. at 21-24. On August 12, 1994, final judgment was filed in favor of Officer Tanaka, Prosecutor Kaneshiro, Chief Nakamura, Judge Dashiell, Judge McKenna and the State of Hawaii. E.R. at 25. Mr. Shak filed a timely Notice of Appeal on August 19, 1994. E.R. at 26-29. C.R. 23. On August 22, 1995, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. Mr. Shak filed a Petition for Rehearing, which the United States Court of Appeals for the Ninth Circuit denied on December 1, 1995. Mr. Shak then filed a Petition for Writ of Certiorari in the Supreme Court of the United States on January 30, 1996.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. SUMMARY OF ARGUMENT

As he states in page 9 of his Opening Brief, Mr. Shak does not contest whether Officer Tanaka had probable cause to arrest Mr. Shak without a warrant, nor does he contest the constitutional validity of his arrest. Tr. 7/27/94 at 8-9, 12- 13; C.R. 17 at 3. Rather, Mr. Shak claims (1) that Officer Tanaka and Chief Nakamura violated Mr. Shak's constitutional right to

due process by arresting and briefly detaining Mr. Shak without a probable cause hearing, and (2) that Officer Tanaka, Chief Nakamura, Prosecutor Kaneshiro, Judge Dashiell, Judge McKenna and the State of Hawaii violated Mr. Shak's constitutional right to due process because they arrested, detained, arraigned, tried and convicted Mr. Shak without filing and providing Mr. Shak with a formal written complaint.

However, Respondents assert that: (1) while the Fourth Amendment to the U.S. Constitution generally requires a judicial determination of probable cause as a condition for the pretrial detention of an arrestee, a police officer's on-the-scene assessment of probable cause provides sufficient legal justification for a brief period of detention without a probable cause hearing so that the police officer can take administrative steps incidental to the arrest; and (2) due process does not require police officers, prosecutors or courts to provide an arrestee of a misdemeanor with a copy of a written complaint, as long as the arrestee is fully informed of the charges against him or her.

B. THE WRIT PRESENTS NO FEDERAL QUESTION APPROPRIATE FOR REVIEW BY THIS COURT SINCE THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT DECISION IN THE INSTANT CASE AND APPLICABLE UNITED STATES SUPREME COURT PRECEDENTS

1. The Ninth Circuit Properly Looked To State Law To Determine That Petitioner's Detention For Approxi-

mately One Hour And Forty-Five Minutes In Order For The Officer To Take Reasonable Administrative Steps Incident To Arrest Was Well Within Hawaii's Forty-Eight Hour Maximum Time Limit For Detention Without A Judicial Determination Of Probable Cause. There Is No Inconsistency With This Court's Decisions in Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991).

Petitioner's Petition for Writ of Certiorari must be denied because it presents no federal issues for decision by this Court. The Ninth Circuit Court of Appeals decision is supported by precedent, and is not in conflict with any decisions by this Court.

The first of Mr. Shak's arguments is that Officer Tanaka and Chief Nakamura violated his constitutional rights under the Fourth and Fourteenth Amendments because Officer Tanaka arrested and briefly detained Mr. Shak without a probable cause hearing. E.R. at 3-4, 7-10.

Mr. Shak relies heavily on Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) and County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), to demonstrate an inconsistency between the Ninth Circuit decision below and United States Supreme Court precedent. That reliance is misplaced.

Gerstein v. Pugh is not inconsistent with the

decision of the Ninth Circuit. In Gerstein v. Pugh, under Florida law, "a person charged by information could be detained for a substantial period solely on the decision of a prosecutor [without first having obtained a judicial determination of probable cause]." Gerstein v. Pugh, 420 U.S. at 106. This Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Id. at 114 (emphasis added).

However, this Court in Gerstein v. Pugh, tried to balance an individual's rights against rash and unreasonable interferences with privacy and unfounded charges of crime, and a state's interest in enforcing the law for the protection of the public. This Court reasoned that a practical compromise would be that

> "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a **brief period of detention to take the administrative steps incident to arrest**. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." Id. at 113-114 (emphasis added).

This Court in Gerstein v. Pugh also recognized that state systems of criminal procedure vary widely. This Court further stated:

> Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition

> for any **significant pretrial restraint** of liberty, and this determination must be made by a judicial officer either before or **promptly** after arrest.

Id. at 123-125 (emphasis added).

The Ninth Circuit initially "look[s] to state law to determine the lawfulness of an arrest by a state officer for a state offense. U.S. v. Shephard, 21 F. 3d 933, 936 (9th Cir. 1994). With respect to post-arrest procedures under Hawaii law, "a person arrested for a petty misdemeanor offense possesses not an absolute right to immediate release, but rather a right to release without unnecessary delay upon payment of bail." State of Hawaii v. Langley, 62 Haw. 79, 81, 611 P.2d 130, 132 (1980) (holding that a defendant's uncontrollable and disruptive behavior warranted his temporary incarceration after he had been arrested for disorderly conduct); State of Hawaii v. Vance, 61 Haw. 291, 302-303, 602 P.2d 933, 940-941 (1979) (holding that a defendant's hostile and threatening conduct at the police station justified his brief detention as a calming-down period and to prevent him from continuing his harassing behavior). "[W]hat constitutes 'unnecessary delay' requires consideration of all the facts and circumstances at the time. Relevant factors that may justify a temporary delay include the physical condition or conduct of the person arrested." State of Hawaii v. Langley, 62 Haw. at 81, 611 P.2d at 132; State of Hawaii v. Vance, 61 Haw. at 302, 602 P.2d at 941.

Like the defendant in State of Hawaii v. Langley, Mr. Shak was arrested for mere misdemeanor offenses, and thus, Mr. Shak did not possess an abso-

lute right to immediate release, but rather a right to release without unnecessary delay upon payment of bail. Officer Tanaka detained Mr. Shak for no more than a total of one and three fourths hours in order to take standard administrative steps incident to an arrest, such as transporting, booking and fingerprinting Mr. Shak (Tr. 7/27/94 at 7; E.R. at 3- 4), and thus, Officer Tanaka did not unreasonably delay Mr. Shak's release.

In the State of Hawaii, law enforcement officials can wait no longer than a maximum of forty-eight hours before they must either release arrested persons or charge them with a crime and take them before a qualified magistrate for a judicial determination of probable cause. Haw. Rev. Stat. § 803-9(5) (1993).[7] The one hour and forty-five minute time period of Mr. Shak's detention was well within Hawaii's forty-eight hour time limit.

Moreover, the Ninth Circuit holds that police officers do not violate the Fourth Amendment by arresting and detaining arrestees for as long as nineteen hours without a probable cause hearing, as long as the reason for the detention is to allow the police officers to take administrative steps that are incident to the arrests. Kanekoa v. City and County of Honolulu, 879

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[7]§803-9 Examination after arrest; rights of arrested person. It shall be unlawful in any case of arrest for examination:

. . . .

(5) To fail within forty-eight hours of the arrest of a person on suspicion of having committed a crime either to release or to charge the arrested person with a crime and take the arrested person before a qualified magistrate for examination.

Haw. Rev. Stat. § 803-9(5) (1993).

F.2d 607 (9th Cir. 1989), cert. denied, 500 U.S. 933 (1991).

In Kanekoa, police officers in Honolulu had detained intoxicated arrestees up to nineteen hours so that the arrestees could become sober and the police officers could conduct investigations. 879 F.2d 609. Despite the fact that the police eventually dropped all charges against the arrestees and released them before any probable cause hearing took place, such detention did not violate the Fourth Amendment, because the police had needed up to nineteen hours in order to take the "administrative steps" incident to the arrests. Id. at 610-611.

One cannot determine whether the time period for such "administrative steps" is reasonable merely by counting hours, because the Ninth Circuit "ha[s] rejected any per se rules and ha[s] held that the time period required by the fourth amendment depends on the circumstances of each case. Kanekoa v. City and County of Honolulu, 879 F.2d at 610. The Kanekoa court explained that "administrative steps, incident to arrest" specifically include the following:

> "[A]dministrative steps" include procedures which provide the police with basic information from the suspect. An interview may inform the police of the suspect's identity, residence, competence, and whether it is safe to release the suspect pending further proceedings. Moreover, an interview may inform the police that the case is no longer worth pursuing. It provides an early opportunity for the suspect to exculpate himself.

Id. at 611.

In the instant case, Mr. Shak was detained for approximately one hour and forty-five minutes, **a brief period of time** which was necessary for Officer Tanaka to take the **administrative steps** of transporting, fingerprinting and booking Mr. Shak, which were clearly incidental to Mr. Shak's arrest. This was **not inconsistent** with this Court's rationale in Gerstein v. Pugh, that "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a **brief period of detention to take the administrative steps incident to arrest**." Gerstein v. Pugh, 420 U.S. at 113-114 (emphasis added). The brief detention of Mr. Shak was also well within the requirements of Hawaii law requiring law enforcement officials to wait no longer than a maximum of forty-eight hours before they must either release arrested persons or charge them with a crime and take them before a qualified magistrate for a judicial determination of probable cause. Haw. Rev. Stat. § 803-9(5) (1993). Additionally, Gerstein v. Pugh addressed situations in which there was **extended restraint of liberty** following arrest. In the instant case, Mr. Shak was released after one hour and forty-five minutes. There was no extended restraint of Mr. Shak's liberty.

In addition to Gerstein v. Pugh, Mr. Shak also relies on County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). This Court in County of Riverside v. McLaughlin held that:

> A jurisdiction that provides judicial determinations of probable cause **within 48 hours of arrest** will, as a general

> matter, comply with the **promptness** requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges.

Id. at 56 (emphasis added).

Mr. Shak was detained for approximately one hour and forty five minutes, a brief period of time which was necessary for Officer Tanaka to take the reasonable administrative steps of transporting, fingerprinting and booking Mr. Shak which were clearly incidental to Mr. Shak's arrest. Tr. 7/27/94 at 7; E.R. at 3-4. The one hour and forty-five minute time period of Mr. Shak's detention was well within Hawaii's forty-eight hour time limit. This is clearly **not inconsistent** with this Court's holding in County of Riverside v. McLaughlin. There was no need for a judicial determination of probable cause since Mr. Shak was only briefly detained in order that administrative steps incidental to his arrest could be completed.

Mr. Shak's Fourth Amendment rights were not violated, because Mr. Shak was released as soon as Officer Tanaka had concluded with the administrative steps incident to Mr. Shak's arrest. Therefore, this Court should deny the petition for writ of certiorari, as the Ninth Circuit's affirmation of the district court's decision is not inconsistent with this Court's decisions in Gerstein v. Pugh and County of Riverside v. McLaughlin, and therefore there is no federal question appropriate for review by this Court.

2. Mr. Shak Was Not Entitled To A Grand Jury Indictment Since A Misdemeanor Conviction May Be Sought

> And Sustained On The Basis Of An Information Standing Alone. There Is No Inconsistency With The Ninth Circuit's Decision In The Instant Case And This Court's Decisions in In the Matter of George M. Bain, Jr., 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) and Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927).

The second of Mr. Shak's arguments is that due process requires the prosecutor to file and present a formal written complaint to an arrestee for a misdemeanor violation prior to a court hearing. Mr. Shak relies on this Court's decisions in In the Matter of George M. Bain, Jr., 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887) and Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927), to demonstrate an inconsistency between the Ninth Circuit decision below and United States Supreme Court precedent. That reliance is misplaced.

In the Matter of George M. Bain, Jr. is not applicable to the situation in the instant case. In the Matter of George M. Bain, Jr. concerned the issue of whether or not a petitioner's indictment, originally found by a grand jury, can be amended without reassembling the grand jury, and defendant thereafter tried by a court based on the amended indictment. In the Matter of George M. Bain, Jr. at 3. This Court held that:

> the indictment on which [Mr. Bain] was tried was no indictment of a grand jury. [S]ound principle require[s] us to hold

> that after the indictment was changed it was no longer the indictment of the grand jury who presented it. If there is nothing before the court which [Mr. Bain], in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned.

Id. at 13.

In the instant case, Mr. Shak was **not entitled** to a grand jury indictment. "The grand jury requirement of the Fifth Amendment is not applicable to the states, and accordingly, prosecution via an information is not unconstitutional." James v. Reese, 546 F.2d 325, 327-28 (9th Cir. 1976) (emphasis added); see also Morford v. Hocker, 394 F.2d 169 (9th Cir. 1968). Mr. Shak's reliance on In the Matter of George M. Bain, Jr. is misplaced, as it is not applicable to his situation.

Mr. Shak also relies on Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505 (1927) to demonstrate an inconsistency between it and the Ninth Circuit decision below with regards to whether or not a court acquires jurisdiction over a person absent the filing and presentation of a formal written complaint to an arrestee.

Albrecht v. United States concerned defects in the information and affidavits which charged the defendants with violations of the National Prohibition Act. 273 U.S. at 3. The defendants argued that the district court had no jurisdiction over them because of the defects, and that their rights guaranteed by the

Fourth Amendment were violated. Id. at 4.

The defendants were, however, already held under their bonds, and therefore under the jurisdiction of the court, in spite of the fact that they were held under a warrant supported by an unverified affidavit. Id. at 10. The government thereafter filed properly verified affidavits by leave of court. Id. at 10. This Court held that:

> The defect in the proceeding by which they had been brought into court had been cured. By failing to move to quash the warrant before the defect had been cured, the defendants lost their right to object.

Id. at 10. The defendants were, in essence, within the territorial jurisdiction of the court, in spite of defects in the information and affidavits. Id. at 9.

Mr. Shak, in the instant case, claims that his arraignment and trial were constitutionally invalid because no one filed a formal written complaint against him, and, [a] person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Albrecht v. United States, 273 U.S. at 8. However, in the very same case which Mr. Shak cites, the U.S. Supreme Court also stated that "[w]here there was an appropriate accusation either by indictment **or information**, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance." Id. (emphasis added). Mr. Shak did in fact appear for arraignment before Judge Dashiell on December 29, 1993. E.R. at 4. He also appeared before

Judge McKenna for trial on March 17, 1994. E.R. at 5. Mr. Shak also made a motion to dismiss charges against him at the trial, alleging that the court lacked jurisdiction. E.R. at 5. Judge McKenna denied the motion. E.R. at 5. This was not inconsistent with this Court's decision in Albrecht v. United States.

Furthermore, it was not necessary for law enforcement authorities to file a formal complaint prior to Mr. Shak's arraignment and trial for his misdemeanor violations, because "**a misdemeanor conviction may be sought and sustained upon the basis of an unverified Information standing alone.**" Church v. United States, 412 F.2d 836, 838 (9th Cir. 1969) (emphasis added). In Church v. United States, the court affirmed the United States District Court for the District of Hawaii's decision to convict a defendant of a misdemeanor offense, "retention of stolen property," despite the defendant's claim "that the proceedings were improperly instituted because no complaint was filed prior to and in support of the Information." 412 F.2d at 838 (emphasis added).

Like the offense in Church v. United States, Mr. Shak's three offenses were mere misdemeanors, the resulting penalty for which was a mere monetary fine of $35.00, and thus, Mr. Shak was not entitled to a formal complaint. E.R. at 6, and Tr. 7/27/94 at 14. Upon his release on bail, Mr. Shak was given a bail receipt informing him of the charges and the time to appear in court. Tr. 7/27/94 at 5-6; Mr. Shak's Brief at 4. Additionally, before Mr. Shak's conviction, a deputy prosecutor orally read the formal charges to Mr. Shak at least two times in open court. E.R. at 5-6; Tr. 7/27/94 at 12. Clearly, Mr. Shak was fully aware of the charges

he was facing in order to adequately defend himself. Thus, it did not offend the United States Constitution when the prosecuting attorney sought to convict Mr. Shak on the basis of an information standing alone. No filing of a formal complaint was necessary. Therefore, this Court should deny the petition for writ of certiorari, as Mr. Shak was not entitled to a grand jury indictment since a misdemeanor conviction may be sought and sustained on the basis of an information standing alone. Additionally, the Ninth Circuit's decision is not inconsistent with this Court's decisions in In the Matter of George M. Bain, Jr. and Albrecht v. United States, and therefore there is no federal question appropriate for review by this Court.

C. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT DECISION IN THE INSTANT CASE AND DECISIONS IN OTHER CIRCUIT COURTS OF APPEALS THAT FORMAL ARRAIGNMENT IS NOT NECESSARY, AND THERE IS NO DENIAL OF DUE PROCESS, WHERE AN ARRESTEE IS FULLY INFORMED OF THE CHARGES AND IS ADEQUATELY ABLE TO DEFEND AGAINST THEM

It is well established in federal courts that due process does not require a formal arraignment as long as the criminal defendant knows what he is accused of and he is able to defend himself. United States v. Romero, 640 F.2d 1014, 1015 (9th Cir. 1981); see also

Garland v. Washington, 232 U.S. 642, 645 (1914).

In Dell v. State of Louisiana, 468 F. 2d 324, 325 (5th Cir. 1972), cert denied, Dell v. Louisiana, 411 U.S. 938 (1973), the petitioner alleged that he was denied due process because he was not formally arraigned nor given actual notice of what he was charged with prior to trial. 468 F.2d at 325. The Fifth Circuit Court of Appeals affirmed the district court's finding that "petitioner did in fact know of the armed robbery charges which were lodged against him in [the] case and that when he went to trial he was fully cognizant of the fact that he was being tried for armed robbery." Id. at 325. In United States v. Hart, 457 F.2d 1087, 1089 (10th Cir. 1972), cert. denied, Hart v. U.S., 409 U.S. 861 (1972), the defendant alleged that he was not formally arraigned. 457 F.2d at 1089. The Tenth Circuit Court of Appeals, however, stated that "[a]lthough there is no evidence in the record to indicate whether [defendant] was formally arraigned, the general rule is that arraignment under Rule 10 [of the Federal Rules of Criminal Procedure] is not necessary when the defendant knows what he is accused of and is able to adequately defend himself. Id. at 1089 (citing Garland v. Washington, 232 U.S. 642 (1914)). The Tenth Circuit Court of Appeals further stated that "[t]he record reflects that [defendant] was well appraised of the charges against him and that he was fully prepared for trial. There was no denial of due process." Id. at 1089.

In Bradley v. United States, 447 F.2d 264, 270 (8th Cir. 1971), vacated on other grounds, 404 U.S. 567 (1972), there was the absence of a proper arraignment since defendant was determined to be incompetent on

the date the arraignment was held. 447 F.2d at 270. However, the Eighth Circuit Court of Appeals stated that "the absence of a proper arraignment does not in itself require a reversal; prejudicial error is essential to require reversal; none has been suggested here[.]" Id. at 270. Accordingly, a conviction will not be vacated for lack of formal arraignment proceedings unless possible prejudice is shown. United States v. Romero, 640 F.2d 1014, 1015 (9th Cir. 1981); see also United States v. Grote, 632 F.2d 387, 389 (5th Cir. 1980), cert. denied, Grote v. United States, 454 U.S. 819 (1981).

"Even in those instances where the defendant has not been furnished a copy of the indictment and a post-trial attack has been mounted, - it has been held that no prejudice warranting vacation of the conviction results if the charges were read and explained to the defendant before the jury was sworn." United States v. Bey, 499 F.2d 194, 201 (3d Cir. 1974), cert. denied, Bey v. United States, 419 U.S. 1003 (1974).

Moreover, the Hawaii Rules of Penal Procedure Rule 5 (b) (1) provide that "[i]n the district court, if the offense charged against the defendant is other than a felony, the complaint shall be filed or the **oral charge stated**, [and] a copy of such charge and any affidavits in support thereof shall be furnished the defendant upon his request[.]" Haw. R. Penal P. 5 (b) (1). However, the underlying purpose of filing a complaint for an arraignment is merely to ensure that an arrestee understands the pending charges. 1 Charles A. Wright, Federal Practice and Procedure § 162, at 551, 552 (1982). In non-felony cases, the accused is **orally**

apprised of the pending charges in open court,[8] and thus, the Supreme Court of Hawaii holds that "the omission to furnish a copy [of a complaint] is not jurisdictional." Shak v. Doi, 49 Haw. 404, 406, 420 P.2d 100, 102 (1966) (emphasis added).

Other circuit courts of appeals have held that there is no denial of due process when a defendant understands the charges against him which are read to him in open court, in spite of the fact that he is not given a copy of the indictment or information. If a government prosecutor has read all charges to a defendant in open court, "the failure, if any, to provide [the] defendant with a copy of the information [i]s not a denial of due process." Richardson v. United States, 217 F.2d 696, 698 (8th Cir. 1954) (emphasis added); Ray v. United States, 192 F.2d 658, 659 (5th Cir. 1951). Merritt v. Hunter, 170 F.2d 739, 741 (10th Cir. 1948).

Upon his release on bail, Mr. Shak was given a bail receipt informing him of the charges and the time for him to appear in court. Tr. 7/27/94 at 5-6; Mr. Shak's Opening Brief at 4. Furthermore, before Mr. Shak's conviction, a deputy prosecutor orally read the formal charges to Mr. Shak in open court on two separate occasions. E.R. at 5-6; Tr. 7/27/94 at 12. Any alleged failure to provide Mr. Shak with a formal written complaint did not deny Mr. Shak due process under the Fourth and Fourteenth Amendments to the United States Constitution. Therefore, this Court

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[8]Under Hawaii Rules of Penal Procedure Rule 5(b)(1), "[a]rraignment shall be in open court and shall consist of the reading of the complaint or the statement of the oral charge to the defendant, or stating to him the substance of the charge and calling on him to plead thereto." Haw. R. Penal P. 5(b)(1).

should deny the petition for writ of certiorari, as the Ninth Circuit's decision is not inconsistent with decisions in other circuit courts of appeals that formal arraignment is not necessary, and there is no denial of due process, where the defendant knows what he or she is accused of and is adequately able to defend himself or herself. Therefore, there is no federal question appropriate for review by this Court.

D. CONCLUSION

For the reasons above-cited, Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro respectfully request that Petitioner's Petition for Writ of Certiorari be denied and that Respondents Keith Tanaka, Michael Nakamura, and Keith Kaneshiro be given such other relief as this Honorable Court may deem just and proper.

DATED: Honolulu, Hawaii, March 27, 1996.

Respectfully submitted,

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